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BOOK REVIEW

The Originalist Presidency in Practice?

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Review of Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers* (Harvard University Press 2020)

Saikrishna Prakash, the James Monroe Distinguished Professor of Law at the University of Virginia, has written a terrific book. In "The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers," Prakash provides a wide-ranging and deeply researched account of the expansive understanding of presidential power today and how it compares to the Constitution's original meaning. In brief, the comparison is not favorable—at least if one is looking for a close fit. As Prakash explains in detail, the modern president's power has vastly expanded relative to the prevailing conceptions of the Founding era.

Prakash provides several case studies of this phenomenon, examining how the president's power to use military force, to conduct foreign affairs, and to make policy on his own, rather than simply executing Congress's, has grown over time. Prakash concludes the book with an interesting and inventive set of proposals to "recage" the president's power, which are worth reading in full.

In this review, I focus less on whether the president's power has expanded and more on Prakash's story of how we got here. Why is it that the modern president's power is so much more expansive than that of the Founding era? Prakash discusses developments in public expectations of the president and the corresponding shift in presidential behavior to meet such expectations. But his main focus centers on an interpretive methodology that, in his view, has enabled the expansion of presidential power. As the title suggests, Prakash pins most of the blame on what he calls "living constitutionalism." Prakash uses the term broadly to include any form of interpretation that allows for "informal constitutional change" outside the Article V amendment process (see pp. 112-13, 130). Prakash's main target, though, is the common interpretive practice of relying on historical branch practice in determining the constitutionality of presidential exercises of power.

It is worth pausing to note that—as Prakash predicts—many people are likely to object to bundling together the various interpretive methods that look to past branch practice as "living constitutionalism." Many such theories do not seem to be self-consciously conceived of as theories of constitutional change,

rather than interpretation. Take, for example, perhaps the preeminent such theory, Justice Felix Frankfurter's "historical gloss" approach set forth in *Youngstown*. Under this approach, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, … may be treated as a gloss on 'executive Power' vested in the President."

Whether Frankfurter's gloss approach can be described as a theory of "informal constitutional change" is debatable. Frankfurter explicitly rejected the notion that such gloss can replace the Constitution's meaning, stating that "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution, but they give meaning to the words of a text or supply them." And, in introducing his approach, Frankfurter explained that "[i]t is an inadmissibly narrow conception of American constitutional law … to disregard the gloss which life has written upon [the words of the Constitution]." Frankfurter thus did not seem to conceive of his approach as a way to "amend" or "change" the Constitution but, rather, as a means to interpret—that is, identify the gloss on—its words.

Yet, of course, the line between interpretation and amendment can be fuzzy and, as Prakash points out, Frankfurter's approach has not been applied in an idealized, theoretical form—particularly in the real-world practice of executive branch lawyers. For example, the gloss approach should apply only when constitutional meaning is not clear (otherwise the gloss *would* "supplant" the meaning), but there are obvious incentives to find ambiguity even where it doesn't exist—especially if doing so allows the president to engage in preferred action. And while historical practice is only meant to provide gloss if there is a sufficiently "systematic, unbroken practice" that has "never before been questioned," it turns out that determining what "practice" is relevant and whether it has truly been "systematic, unbroken" and "never before questioned" also leaves much room for motivated reasoning.

Perhaps even more fundamentally, any approach that privileges whichever branch can act and object more—as the gloss approach does—will systematically favor the president over Congress, because the president can act more easily and has invested in institutions like the Department of Justice's Office of Legal Counsel (OLC), whose role is to object to perceived constitutional intrusions by Congress. Congress, meanwhile, lacks such an institution and has not had the incentive to create one. In short, as Prakash explains (and as other scholars have suggested), an interpretive method that treats consistent past practice and lack of objection as evidence of constitutionality will systematically privilege the president. And, as Prakash shows, so it has.

There is thus good reason to think Prakash is correct that the standard resort to historical branch practice in separation of powers interpretation has contributed to the prevailing expansive views of the president's power. But a key question remains in assessing the role of this interpretive approach: *compared to what?*

Prakash clearly thinks originalism is a superior alternative—the book is subtitled "An Originalist Argument Against [the Living Presidency's] Ever-Expanding Powers." But, if the primary critique of the "Living Presidency" is how it has operated in practice to expand the scope of the president's power, it seems important to ask whether originalism would operate any better in its stead. But the focus of Prakash's important and erudite book is elsewhere. Prakash's book operates largely as a comparison of how a rigorous and principled form of originalism (i.e.,

Prakash's) compares to how the interpretive method of looking to past branch practice has fared *in reality*. It is thus largely a comparison of originalism *in theory* versus resort to past practice *in practice*. Largely left out of the picture is the more apples-to-apples comparison of how originalism *in practice* compares to resort to past practice *in practice*. It is this comparison that lingered with me after reading Prakash's terrific book and the one I'll explore in the remainder of this review.

In my view, this comparison is well worth making. If the major critique of "living constitutionalism" is how it has operated in practice to produce a more expansive, less originalist vision of presidential power, then it seems fruitful to ask whether potential alternatives would fare better in practice. After all, as noted above in relation to the historical gloss approach, resort to past practice *in theory* could result in much narrower views of presidential power than have resulted in reality. Comparing how these methods are likely to operate in the world seems important in assessing their relative strengths and weaknesses.

Admittedly, how originalism would fare in practice as compared to so-called "living constitutionalism" is largely a counterfactual question, so we'll never really know the answer. But I confess that I have my doubts that originalism as practiced in the executive branch, at least, would necessarily fare better than what Prakash terms "living constitutionalism." Below I flesh out two reasons for these doubts—the first, institutional, and the second, empirical (albeit anecdotal).

First, it is not clear that executive branch lawyers are institutionally capable of engaging in the sort of rigorous and principled originalism Prakash undertakes. The primary expositor of executive branch views of presidential power is OLC. (Disclaimer: I worked at OLC from 2015 to 2017.) Even if one takes as a given that the original public meaning of the Constitution is what interpreters ought to look for and that it can be reliably determined, identifying such meaning will typically require rigorous historical analysis of Founding era sources. But OLC attorneys are not selected for their ability, nor are they likely to be otherwise qualified, to engage in the sort of historical work necessary to do originalism properly.

What does doing originalism "properly" entail? Modern originalism typically seeks to determine the original public meaning of the Constitution. Although Prakash does not delve in detail into his clearly rigorous methodology in the book, another prominent originalist—and Prakash's colleague at the University of Virginia—Lawrence Solum has explained that when resort to linguistic intuitions regarding the constitutional text is not determinative—as will often be the case for hard questions of presidential power—"rigorous methods" will be necessary to determine the relevant meaning. Such methods include corpus linguistics analysis—something few lawyers are trained in—and "immersion" into historical-era texts, which:

ideally [involves reading] a wide spectrum of texts, including personal diaries, fiction, newspapers, pamphlets, and written records of oral events. The traditional sources of information regarding framing and ratification might form part of such immersion, but acquiring linguistic competence would require exposure to a wider variety of texts.

Even if this ideal form of immersion is not always required, it seems intuitive that understanding the original public meaning of a contestable term from more than 200 years ago will require something akin to the deep historical research that Prakash exemplifies in his book. But it is one thing for scholars to engage in such work, with all the attendant time and training that academia can supply.

Prakash, himself, notes that he has been doing such work on the American presidency for more than a quarter of a century (p. 14). It is another thing entirely for lawyers working in the executive branch to try to do it.

Indeed, it is an open question whether *courts* can competently engage in such work. Defenders of originalism have acknowledged that even the Supreme Court will often have a hard time applying originalism appropriately. The court might be short on time and have difficulty determining which competing historical narrative briefed by the parties is correct. But at least the court has briefs. The Office of Legal Counsel is in a significantly worse institutional position than the court. For one, OLC does not have the benefit of fancy lawyers briefing the relevant historical questions with the aid of historians and experts in the field like Professor Prakash. Moreover, unlike the court, which controls its briefing schedule and largely determines when it will issue its opinions, OLC is frequently at the mercy of fast-moving contemporary events requiring quick resolution. In short, OLC is not institutionally set up to engage in rigorous originalist work of the type that scholars like Prakash—or even the Supreme Court—can engage in.

To be sure, the nonadversarial nature of OLC's work renders it institutionally different from judicial adjudication in general. But its weaknesses are particularly acute here. Even without party briefing, OLC attorneys are well trained in interpreting and applying cases and might even have a good sense of the history of, especially modern, presidential practice. But it is quite another thing for them to engage in deep research of late 18th century American historical understanding.

A concrete example might help flesh all this out. The Constitution famously gives Congress, rather than the president, the power to "Declare War." The implication is that the president cannot go to "War" without congressional approval. But the question remains when, if ever, can the president use military force abroad without congressional approval?

Modern OLC doctrine—largely constructed by looking to past practice—requires a two-part test: First, the president must "reasonably determine" that the desired military force will serve "sufficiently important national interests," like self-defense or regional stability; and second, the "nature, scope, and duration" of the operations must fall short of "War"—otherwise Congress would have to approve (p. 165). As Prakash notes, this is hardly a constraining test.

Prakash posits a more straightforward test based on his originalist work. According to Prakash, "War" is any use of military force, and "Declare" is any form of support by Congress. The president thus cannot use any form of military force abroad unless Congress has approved of such use of force. One might think that to "Declare" war, Congress must give an explicit and formal "Declaration," but Prakash states this is incorrect. No "magic words" are required; any form of approval is sufficient—including implicit approval through funding military operations already underway, as occurred with respect to operations in Kosovo in the 1990s. According to Prakash, "[a]s far back as the Founding, it was understood that if you appropriated money for a war, you had exercised the power to declare war" (p. 171).

Assuming Prakash is correct that the proper test is essentially that Congress must "approve any use of military force in some way," the point to see is that this interpretation does not follow naturally from the text. To get to this proposed test, Prakash had to engage in the deep historical work the book sets forward. OLC attorneys are unlikely to have the time or ability to derive such a test from the historical sources.

Perhaps this is not the best example. We might expect OLC attorneys to have studied the "Declare War" clause, and Prakash has, after all, just written a book answering the question of when the president can use military force consistent with this clause. OLC attorneys could now just read Prakash's book for the answer. But what about all the questions Professor Prakash—or other originalist scholars—have not answered? For the mere OLC attorney, figuring out what the original public meaning of particular text is and how it applies to contemporary events will be extremely difficult unless there is already scholarship on the question (and even then, they might be wary of relying on only one source and there will be instances where scholars disagree). For example, what if the question is whether a cyberattack on a foreign country can be undertaken without congressional authorization? How is an OLC attorney to decide if that action can be taken consistent with the original meaning of the "Declare War" clause?

Such questions might highlight why interpreters have been so drawn to looking to past practice in aid of constitutional interpretation—resort to past practice is thought to ground OLC's advice in real-world application and help maintain a somewhat principled and achievable consistency over time, rather than requiring OLC to try to answer difficult or impossible questions regarding vague meaning or historical fact that it might easily get wrong.

Of course, for some questions, the relevant answer might be clear. But for many of the questions that OLC addresses, there is likely to be no scholarly consensus on the original public meaning of the provisions at issue. In such cases, it is not clear that OLC is institutionally capable of engaging in the sort of rigorous originalism that Prakash exemplifies.

One might respond that such institutional deficits could be solved through straightforward institutional reforms of increasing historical resources, hiring trained originalists as OLC attorneys and prioritizing time spent on relevant historical research. This seems theoretically possible—albeit unlikely. But, even if that is the solution, it raises a second question: If we had committed and trained originalists in OLC, could we be confident this would result in narrower, more originalist interpretations of the Constitution? Here, too, the answer is not clear.

The pressures to accede to the president's wishes that have operated on past executive branch interpreters would remain, and even devout originalists might not be able to withstand them. Indeed, there is some (admittedly anecdotal) evidence to support this concern. Prominent originalists have served in leadership positions in OLC, including then-Assistant Attorney General Antonin Scalia and Deputy Assistant Attorney General John Yoo. I am not aware of evidence establishing that, when more originalists have served in OLC, their tenure coincided with meaningfully narrower views of presidential power more aligned with Prakash's originalist account—although this would be worth studying more rigorously. Meanwhile, we have well-known examples where the opposite seems to have occurred. Yoo was responsible for some of OLC's most expansive positions, like the claim that "the President may deploy military force preemptively [without congressional authorization] against terrorist organizations or the states that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11." This view—which was itself the result of an attempt to apply originalist methods—hardly aligns with Prakash's view of the "Declare War" clause.

In short, OLC is not set up as an institution to do proper originalist work,

and when originalists have been in charge it does not seem that they have consistently put forward narrower positions more aligned with Prakash's originalist views. There is thus reason to question whether originalism, in practice, would necessarily result in a less expansive, more originalist presidency than the one Prakash argues "living constitutionalism" has produced.

Throughout this review, I have tried to accept *arguendo* the proposition that originalism is at least sometimes feasible and desirable. But the discussion above may echo prominent debates about whether originalism really is as determinate or constraining as its proponents suggest. Wherever one comes out on this critique with respect to judges—where most of the debate has focused—it is worth thinking more about how originalism is likely to operate in nonjudicial contexts. Many observers have critiqued judges' ability or desire to engage in rigorous originalism, but judges are more institutionally capable of engaging in such originalism than lawyers in the executive branch (or Congress). Yet such nonjudicial actors frequently have to interpret the Constitution to determine the legality of certain conduct. In assessing the proper interpretive method for such actors, it would be worthwhile to focus more explicitly on the feasibility of *these actors* using the relevant method. Even if an interpretive method might work for academics or judges, it might not be a realistic approach for nonjudicial actors, who are also tasked with interpreting the Constitution.

Prakash might well be right that a "Living Presidency" got us where we are, but would an "Originalist Presidency" have put us anywhere better? The answer is not so clear. The people primarily responsible for interpreting the constitutionality of the president's exercises of power often cannot conduct the rigorous work required to engage in principled originalism (assuming this is otherwise a proper and achievable goal). So what methods of constitutional interpretation are feasible for these interpreters? How ought we balance an interpretive method's normative desirability in some contexts with practical challenges to its feasibility in others? In my view, these are questions worth asking. And Prakash's important book provides fertile ground to continue the exploration.

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